JUL 22 1941
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—vs.—

OPERA ON TOUR, INC.,

Respondent.

## *PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK and BRIEF IN SUPPORT THEREOF*

WILLIAM MACY,
Attorney for Petitioners.

# INDEX


PAGE

Petition for Writ of Certiorari

Summary Statement of Matter Involved ..... 1

Jurisdiction of this Court ..... 4

Questions Presented ..... 8

Reasons Relied on for Allowance of Writ ..... 9

Prayer ..... 11

Brief in Support of Petition

Opinions of the Courts Below ..... 13

Jurisdiction ..... 13

The Federal Questions Presented ..... 14

Specification of Errors ..... 14

Argument

The injunction violates the constitutional guarantee of freedom of speech and assembly ..... 15

The judgment in this case is in direct conflict with the latest adjudications of this Court ..... 20

The Federal question involved was necessarily passed upon by the New York Court of Appeals .... 20

The blanket injunction violates the Fourteenth Amendment ..... 21


## TABLE OF CASES CITED


American Federation of Labor v. Swing, 312 U. S. 321 ..... 7, 8, 9, 10, 11, 16, 17, 18, 20, 22

Atlantic, etc., R. R. Co. v. Mims, 242 U. S. 532 ..... 19

PAGE

Bakery & Pastry Drivers v. Wohl, No. 901, October Term, 1940, decided June 2, 1941..... 9, 11, 20
Bayer v. Brotherhood of Painters, 108 N. J. Eq. 257..... 21
Carlson v. California, 310 U. S. 106..... 6, 9, 20
Dorchy v. Kansas, 272 U. S. 306..... 5
Hague v. C. I. O., 307 U. S. 496 ..... 9
Herndon v. Lowry, 301 U. S. 242..... 17
Milk Wagon Drivers' Union v. Meadow Moor Dairies, Inc., 312 U. S. 287..... 9, 18, 20
Nat'l Prot. Ass'n v. Cumming, 170 N. Y. 315..... 21
Near v. Minnesota, 283 U. S. 697..... 9, 16
New Negro Alliance v. Grocery Company, 303 U. S. 552..... 5
Norris v. Alabama, 294 U. S. 587..... 19
Rutan v. Local Union, 97 N. J. Eq. 77..... 21
Schneider v. State, 308 U. S. 147..... 17
Senn v. Tile Layers' Union, 301 U. S. 468..... 6, 9, 18, 20
Thornhill v. Alabama, 310 U. S. 88..... 6, 9, 20
Truax v. Corrigan, 257 U. S. 317..... 9
U. S. v. Brotherhood of Carpenters etc., 312 U. S. Decided April 8, 1941..... 10
U. S. v. Caroline Products Company, 304 U. S. 144..... 17
U. S. v. Hutcheson, 312 U. S. 219..... 10, 16
U. S. v. International Hod Carriers' etc., 312 U. S. Decided April 7, 1941..... 10
Wilson-Adams Co. v. Pearce, 264 N. Y. 521..... 21
Wohl v. Bakery & Pastry Drivers' Union, 284 N. Y. 788..... 7, 10, 15, 16, 20

STATUTES CITED

28 U.S.C.A. 344(b). JUDICIAL CODE, SEC. 237(b) 4
XIV TH AMENDMENT TO CONSTITUTION 2

# Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—*vs.*—

OPERA ON TOUR, INC.,

Respondent.

## *PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

*To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

The petition of Joseph N. Weber, as President of the American Federation of Musicians, and George E. Browne, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada, respectfully shows unto this Honorable Court:

### *Summary Statement of Matter Involved.*

1. This case does not concern private or individual rights, but is of far greater significance, as the opening sentence of the prevailing opinion in the New York Court of Appeals says (285 N. Y. 348, 352):

> "The question presented for decision is far reaching and of vital importance to the best interests of unions, of employees, of employers and of the general public."

2. Petitioners are the musicians' union with a membership of about 128,000 (R. 551), and the stage hands' union with a membership of between 50,000 and 60,000 (R. 490), both bona fide labor organizations affiliated with the American Federation of Labor. The members of both organizations are united in interest, being engaged in the same trade or industry—the amusement industry—working in the same places and for the same employers (R. 769).

3. Respondent was organized as a New York corporation in January, 1938 to engage in the general amusement business (R. 806), but confined its activities to the stage presentation of the opera "Faust", travelling from city to city outside of New York State, using live singers, but using a new and novel scheme of recorded or mechanized music from records made in England, in substitution for and in competition with live orchestras, thus creating the danger of further serious inroads on the already greatly depleted employment opportunities of musicians (R. 570, 595, 603, 604), theirs being the only industry in which their own product was being used to "destroy ourselves" (R. 564).

4. At the request of the musicians' union in its combat against this further encroachment on the employment and livelihood of its members, the stage hands' union withdrew its members from respondent's service.

5. The New York Supreme Court thereupon issued a permanent injunction (R. 27), which, in violation of the XIVth Amendment to the U. S. Constitution, in most sweeping terms not alone prohibits a strike by the members of both labor organizations at the instance of either one of

them, but in effect prohibits any picketing, or causing, procuring or advising anyone—even musicians whom respondent says it does not employ or need—(R. 6, 15), by any device or in any manner whatsoever, to leave respondent's employ or not to enter its employ, on the ground or for the reason that respondent uses mechanized music.

The Appellate Division of the New York Supreme Court, by a divided court of 3 to 2, reversed this judgment and dismissed the complaint. The New York Court of Appeals, by a divided court of 4 to 2, reversed the Appellate Division and affirmed the Special Term judgment.

The effect of this judgment is to permanently enjoin both unions, their members and representatives from in any manner or by any device whatsoever, inducing, causing or procuring any person or persons not to work for respondent —irrespective of whether that is brought about by mere request, peaceful persuasion and without force or intimidation of any kind whatsoever. In effect, it prohibits strikes, peaceful picketing, freedom of speech and assembly, and denies to petitioners equal protection of the laws contrary to the XIVth Amendment to the United States Constitution. Respondent may use mechanized music to dispense with musicians' services, but musicians may not protect their employment or livelihood by peacefully opposing the use of mechanized music.

6. As Chief Judge Lehman in his dissenting opinion in the Court of Appeals says (285 N. Y. 363, 365):

> "There is no substantial controversy about the facts * * * The evidence establishes beyond possible contradiction, and the Appellate Division has found, that 'the actions of the defendants were all in good faith, without malice or ill-will, with primary or direct intent to injure or destroy plaintiff's business, without fraud, force, coercion, or intimidation of any kind, in the honest

belief that such actions were necessary for the protection of the employment opportunities of their members, in furtherance of their economic interest in the continued employment of those in allied trades, and there was no effort on the part of the plaintiff to dispute the good faith of the defendants'."

Respondent's officers so testified (R. 89, 140, 423, 424, 432), and the Trial Court so stated (R. 462, 721).

### *Statement as to Jurisdiction.*

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344 (b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925).

The decision of the New York Court of Appeals, by a division of 4 to 2, was rendered April 24, 1941. Pursuant to the New York practice and procedure, this was made the judgment of the Supreme Court, New York County, by order dated June 9th, 1941, and judgment thereon was entered in the Supreme Court, New York County on June 10th, 1941. Application for a rehearing, timely filed, was denied by the Court of Appeals on June 5th, 1941. The Court of Appeals is the highest Court in New York State in which a decision could be had.

Petitioners persistently throughout the trial and on appeal urged and insisted:

1. Upon the right to strike—refusal to work—and to freely and peacefully solicit, persuade and request others to similarly help them in protective measures against the use of mechanized music (R. 65, 115).

2. That the case involved a labor dispute under Section 876-a of the New York Civil Practice Act, prohibiting the injunction here issued;

3. That the case presented merely an economic problem which was for the Legislature and not for the Courts.

These questions were extensively argued throughout the trial as well as on petitioners' motion to dismiss the complaint at the commencement of the trial (R. 67) and at the close of plaintiff's case (R. 546). Respondent's counsel answered by saying (R. 122), that petitioners' acts were not protected either by

"the common law nor the 14th amendment."

There was thus specifically drawn in question, in the case at bar, the constitutional guarantee of free speech.

Respondent again, at page 11 of its brief before the Appellate Division, similarly urged, quoting from *Dorchy* v. *Kansas*, 272 U. S. 306, that the XIVth Amendment did not apply, that the right to carry on a business—be it called a liberty or property—has value and that to interfere with this right without just cause is unlawful. Following up its argument that the XIVth Amendment afforded petitioners no protection for their action, respondent, at page 35 of its brief in the Appellate Division, and at page 3 of its brief in the Court of Appeals, reiterated its position that petitioners' actions were so far outside the allowable area of economic conflict, that the blanket injunction in this case, no matter how sweeping in its terms, was proper.

Petitioners, at page 30 of their brief in the Appellate Division, cited *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, quoting this court's language, which sustains the right to

> "advertise and disseminate facts and information with respect to terms and conditions of employment and peacefully to persuade others to concur in their views respecting an employer's practices."

Petitioners, at pages 63 and 64 of their same brief, made the specific point that this injunction practically prevents free discussion and the dissemination of facts.

Petitioners, in their brief to the Court of Appeals, discussed the sweeping character of this injunction, and cited:

At page 21, *Senn* v. *Tile Layers' Union*, 301 U. S. 468, 482; and at page 35 of the same brief, *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, quoting from the *Thornhill* case, at page 102:

> "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is granted by the Constitution."

The court at Special Term (R. 1222) held that there was no labor dispute, merely an economic question as to whether in the march of time, plaintiff may lawfully use canned music as a medium of conducting operas instead of employing live musicians, and therefore, held defendants' acts to be illegal.

The Court of Appeals in the prevailing opinion (285 N. Y. 348) concludes, at page 357:

> "For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity for employment is not a lawful labor objective."

The opinion, however, at page 353, reiterated the right to strike, and that:

> "Individually and collectively, the members of any union may at any time refuse to work, because machinery is employed or for any other reason, and may strike in so doing. The members of these unions are free to refuse to work if they object to working in the presence of a machine."

The Court of Appeals thus necessarily passed upon the Federal question—the right to strike, the right of freedom of speech by persuasion, solicitation and request, refusing that right to petitioners because of the claimed illegality of their labor objective.

This is further shown by that court's decision in *Wohl* v. *Bakery & Pastry Drivers' Union*, 284 N. Y. 788, decided December 31, 1940, after the case at bar was argued and while it still was awaiting decision by that court. The prevailing opinion of the Court of Appeals in this case, at page 357, refers to the *Wohl* case, as follows:

> "So, too, in a case just unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week."

This court's later reversal in the *Wohl* case, on June 2nd, 1941, No. 91, October Term 1940, on the authority of *American Federation of Labor* v. *Swing*, 312 U. S. 321, sustains the petitioners' position on the Federal questions presented by them.

Chief Judge Lehman, in his vigorous dissent in the case at bar, 285 N. Y. page 360, says that this

"Is an injunction against a strike and nothing else."

and finds that the economic dispute involved is a labor dispute for Legislative enactment and not for the courts, and that this injunction is a constitutional violation. He says at page 369:

> "In my opinion, the assertion of authority by the court in this case to enjoin the defendant union from calling a strike of their members does not accord with judicial decision and Legislative decree which this court has said is valid under the Constitution."

And at page 366:

> "...in my opinion, the injunction issued by the court at Special Term constitutes an intrusion by the court into a field from which it is excluded under the laws of the State as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution."

The Court of Appeals thus decided that it was not a legal labor objective for a labor union to protect its members' employment opportunities by combating the use of labor curtailing devices or equipment. Therefore, the Court of Appeals reinstated a permanent injunction which not alone prohibits a strike in good faith, without malice, force or violence, but also in effect prohibits picketing, freedom of speech and free assembly guaranteed by the XIVth amendment.

## *Questions Presented.*

The following Federal questions, of immense importance not alone to labor but to the general public, are presented by this record:

1. Does the injunction restraining unions from striking—refusing to work—in protest against the introduction of mechanical devices which displace labor, violate the constitutional guarantee of freedom of speech and assembly, and equal protection of the laws?

2. Does the injunction by its unlimited scope infringe the constitutional guarantee of free speech and assembly?

These questions are not complicated by any local question which would independently sustain the injunction. The only other question raised at the trial by petitioners, was the application of §876-a, New York Civil Practice Act. The Court at Special Term, and the Court of Appeals, held that section inapplicable, and it did not enter into the result reached by the Court of Appeals.

***Reasons Relied on for the Allowance of the Writ.***

1. The decision of the New York Court of Appeals is in direct conflict with the following decisions of this court:

*American Federation of Labor* v. *Swing*, 312 U. S. 321;
*Bakery & Pastry Drivers* v. *Wohl*, No. 901, October Term, 1940, decided June 2, 1941;
*Carlson* v. *California*, 310 U. S. 106;
*Hague* v. *C. I. O.*, 307 U. S. 496, 519;
*Milk Wagon Drivers' Union* v. *Meadow Moor, Dairies, Inc.*, 312 U. S. 287;
*Near* v. *Minnesota*, 283 U. S. 697, 716;
*Senn* v. *Tile Layers' Union*, 301 U. S. 468, 478;
*Thornhill* v. *Alabama*, 310 U. S. 88;
*Truax* v. *Corrigan*, 257 U. S. 317, 327;

*U. S.* v. *Brotherhood of Carpenters etc.*, 312 U. S. (Decided April 8, 1941);
*U. S.* v. *International Hod Carriers' etc.*, 312 U. S. (Decided April 7, 1941);
*U. S.* v. *Hutcheson*, 312 U. S. 219.

The decision of the New York Court of Appeals which is sought to be reviewed, is of historic importance.

That Court had made its decision in *Wohl* v. *Bakery & Pastry Drivers* on the ground (as explained in its reference to the *Wohl* case in the case at bar) that the conceded right to strike was nevertheless limited by the "legality" of the object of the strike; that the Court had the right to circumscribe, in accordance with its own notions of economics, the precise area in which labor disputes are "legal".

Having taken that position, it claimed the right to prevent, by injunction, any effort of labor unions to publicize their grievances or by peaceful suasion to win both labor and the public to their point of view. In so doing, the New York Court of Appeals deprived the unions of their Constitutional guarantee of freedom of speech and of assembly, and ran counter to this Court's line of decisions culminating in the *Swing* case, where this Court said (p. 326):

> "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case";

and again (at p. 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state".

It was on the basis of the *Swing* case that this Court reversed the *Wohl* case, but the Court of Appeals decided the case at bar before the *Wohl* case was reversed, and based its holding in the case at bar largely upon its decision in the *Wohl* case.

2. The attempt of the New York Court of Appeals in this case, as well as in *Bakery & Pastry Drivers'* v. *Wohl*, to outlaw strikes inimical to that court's ideas of economics, under the guise of calling such strikes "unlawful," is an effort to outlaw strikes through judicial censorship, and is an insidious method of stifling freedom of speech and assembly. This is a matter of National rather than State importance. It is the only question presented by this record, and the only question passed upon by the New York Court of Appeals in sustaining the injunction.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue out of, and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that court to certify and send to this court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case entitled: "SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: OPERA ON TOUR, INC., Plaintiff—against—JOSEPH N. WEBER, as President of American Federation of Musicians, and

GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Defendants," and that the order and judgment of the said Court of Appeals may be reversed and that your petitioners may have such other and further relief as may be proper.

Dated: New York, July 21st, 1941.

JOSEPH N. WEBER,
Individually and as President of American Federation of Musicians.

GEORGE E. BROWNE, individually and as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada.

By WILLIAM MACY
Attorney for Petitioners
521 Fifth Avenue,
New York City, N. Y.

# Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

### *Opinions of the Courts Below:*

The opinion of the Supreme Court at Special Term, New York County, is reported in 170 Misc. 272. The opinion of the Appellate Division is reported in 258 App. Div. 516. The opinion of the New York Court of Appeals is reported in 285 N. Y. 348.

### *Jurisdiction.*

The jurisdictional basis for the petition and statement of the case are stated in the petition, and for the sake of brevity, are not repeated here.

### *The Federal Questions Presented.*

Those of immense importance not alone to labor but to the general public are:

1) Does the injunction restraining unions from striking—refusing to work—in protest against the introduction of mechanical devices which displace labor, violate the constitutional guarantee of freedom of speech and assembly, and equal protection of the laws?

2) Does the injunction by its unlimited scope infringe the constitutional guarantee of free speech and assembly?

### *Specification of Errors.*

1) The New York Court of Appeals erred in granting a permanent injunction restraining respondents from striking—refusing to work—which injunction violates the freedom of speech, assembly and equal protection of the laws guaranteed by the XIVth Amendment to the Constitution of the United States.

2) The New York Court of Appeals erred in granting a permanent injunction which is so sweeping that it infringes upon petitioners' freedom of speech and assembly in violation of the XIVth Amendment to the Constitution of the United States.

## ARGUMENT

### I.

**The injunction violates the constitutional guarantee of freedom of speech and assembly.**

Chief Judge Lehman points out in his dissenting opinion (285 N. Y. 348):

(a) That the courts have no right to intrude into the field of conflicting economic policy (pp. 366-368);

(b) That the acts of petitioners were all in good faith, without malice or ill-will, without fraud, force, coercion or intimidation of any kind, in the honest belief that such actions were necessary for the protection of the employment opportunities of their members, in furtherance of their economic interests (p. 365);

(c) That this is an injunction against a strike and nothing else (p. 364);

(d) "Why there is no labor dispute here remains a mystery to me" (p. 374).

The prevailing opinion (p. 357) cites and follows *Wohl* v. *Bakery & Pastry Drivers Union*, 284 N. Y. 788, as a "case just unanimously decided", involving "coercion" and an "unlawful labor objective" where a permanent injunction was affirmed, without opinion. This court's reversal of the *Wohl* case applies here because the principles and the issues are the same. There the unions threatened to picket manufacturers and customers of the plaintiffs (peddlers) unless they employed a union member one day a week to assist

them. This was a protest by the union aimed at lessening unemployment among union members. In the case at bar, the protest of the union was aimed at the introduction of mechanical devices which would increase unemployment among union members. In both cases, the New York Court described the acts of the unions as "coercion"; in both cases it described the objective as "unlawful", and in both cases issued injunctions. When the *Wohl* case was brought to this Court, the attention of this Court was called to the decision of the New York Court of Appeals in the instant case to indicate the importance of the issue involved and the evident purpose of the New York Court to outlaw, by labor injunction, strikes which did not agree with that court's economic ideas. The injunction in the *Wohl* case was dissolved by this court, and the same fate should be meted out to the injunction in the case at bar.

Court adjudications of conflicting considerations of economic policy would mean judicial censorship (*Near* v. *Minnesota*, 283 U. S., 697, 716). That would mean complete eradication of free speech and complete usurpation by the courts of legislative functions.

The provisions of this injunction show on its face, that the unions' rights and freedom of speech were actually litigated; otherwise, there would not have been such sweeping provisions.

In the *Hutcheson* case (*supra*), Mr. Justice Frankfurter restates the policy that allowable areas of economic policy are not to be restricted, and says (312 U. S. 219, at pp. 232, 233):

> "So long as a union acts in its self interest and does not combine with non-labor groups, the licit and illicit under section 20 (Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness

or unselfishness of the end of which the particular union activities are the means."

* * * * *

"The refusal of the carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions to similarly refuse to work, are plainly then the free scope accorded to workers by Section 20 for 'terminating any relation of employment' or 'ceasing to perform any work or labor' or 'recommending, advising or persuading others by peaceful means so to do'."

In the *Swing* case (*supra*), Mr. Justice Frankfurter (p. 325) says:

"Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye (*Herndon* v. *Lowry*, 301 U. S. 242, 258; *Schneider* v. *State*, 308 U. S. 147, 161; *U. S.* v. *Carolene Products Company*, 304 U. S. 144, 152n) it would be improper to dispose of the case otherwise than on the face of the decree which is the judgment now under review."

* * * * *

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech * * *. A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and work-

> ers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ * * * Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. Senn v. Tile Layers' Union, 301 U. S. 468, 478."

In *Senn* v. *Tile Layers' Union,* 301 U. S. 468, this Court said at page 482:

> "Each member of the union, as well as Senn has the right to strive to earn his living. Senn seeks to do so through the exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent on securing work; and securing work is dependent upon public favor. To earn the patronage of the public, each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute picketing and truthful publicity are means legal for unions."

The New York Court of Appeals has held that the economic interests concerned justify the injunction. This is directly contrary to the decision in the *Swing* case—a decision foreshadowed by this Court's ruling in *Milkwagon's Drivers Union etc.* v. *Meadow Moor Dairies, Inc.,* 312 U. S. 287, which Judge Lehman called to the attention of the New York Court in his dissenting opinion (285 N. Y. at p. 375). The language used by this Court in the *Swing* case is applicable here:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."

The fact that the majority of the New York Court refused to admit that the right to strike was involved, and that the strike grew out of a legitimate labor dispute, does not prevent this Court from recognizing the obvious—that the right to strike was directly involved, and that prohibiting the strike just as directly involved the guarantees of the Fourteenth Amendment.

A labor dispute exists whether the complaint be one of hours, wages, or elimination of labor by mechanical devices; just as a labor dispute would exist if employers combined to shut down all factories, or if technological improvements made it possible to displace almost all labor. Being shut out of work entirely is surely a more important grievance than the mere question of rate of wages. It is the most important kind of labor dispute there could be. The fact that the New York Court refused to recognize the grievance in this case as a labor dispute, does not rule it out of the case. If the Court of Appeals eliminated the Federal question from consideration, that does not bar this petition for certiorari, where it is so evident that the Federal question was the only question passed upon and decided.

*Atlantic, etc., R. R. Co.* v. *Mims,* 242 U. S. 532, 535.

There is nothing in this record to dispel the presumption that petitioners did not intend to waive their constitutional rights.

*Norris* v. *Alabama,* 294 U. S. 587.

## II.

**The judgment in this case is in direct conflict with the latest adjudications of this Court.**

To sustain the injunction in this case would be to permit the gradual whittling away of the effect of the decisions of this Court in the line of cases which culminated in the *Swing* decision:

> *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478;
> *Thornhill* v. *Alabama,* 310 U. S. 88;
> *Carlson* v. *California,* 310 U. S. 106;
> *Milk Wagon Drivers Union* v. *Meadow Moor Dairies, Inc.,* 312 U. S. 287.

It is quite evident that, if the decision of this Court in *Bakery & Pastry Drivers* v. *Wohl* had been handed down before the Court of Appeals rendered its decision in the case at bar, the result would have been different, and this petition would have been unnecessary. The *Wohl* case was decided by the New York Court of Appeals on December 31, 1940, and its decision in the present case was made on April 24, 1941.

## III.

**The Federal question was the only question involved and was necessarily passed upon by the Court of Appeals.**

The Federal question involved here is not complicated by any local question which would independently sustain the injunction. One question raised at the trial and on appeal by petitioners, was the application of Sec. 876-a of the New York Civil Practice Act, which the Court

of Appeals said did not apply because, it claimed, no labor dispute existed. The labor objective was eliminated as invalid, even though the Court of Appeals at the same time sustained the right of refusal to work because of the use of machinery, or for any other reason—a right which is sustained by authority.

*Bayer* v. *Brotherhood of Painters,* 108 N. J. Eq. 257;
*Rutan* v. *Local Union,* 97 N. J. Eq. 77;
*Wilson-Adams Co.* v. *Pearce,* 264 N. Y. 521, aff'g. 240 App. Div. 718;
*Nat. Prot. Ass'n* v. *Cumming,* 170 N. Y. 315, 320.

Thus the only question left for the Court of Appeals to consider or pass upon, as its decision discloses, was the Federal question which requires a reversal of that Court's decision.

## IV.

### The blanket injunction violates the Fourteenth Amendment.

Even if we assume that the petitioners had no lawful right to strike to accomplish their declared objective, the terms of the injunction not only prohibit the strike itself, but effectively shut the mouths of all members of both unions involved. They dare not even whisper the subject of their grievance. Note the sweeping and blanket provisions of this injunction (R. 26).

It permanently restrains the officers, employees, agents and attorneys of both petitioner-unions from interfering with respondent's employees, and from directing or advising any person to cease performing, or not to perform, for respondent; from inducing, by any means, any person affiliated with any groups of respondent's employees to leave, or refuse to enter, respondent's employment, on the ground that respondent is using recorded music in its theatrical produc-

tions; both unions being directed forthwith to cancel any communication of any sort to any person, bearing on this subject, and to notify all persons affected by any notices, resolutions, etc., to the effect that all such notices, resolutions, etc., were cancelled.

No more effective method of outlawing free speech could be devised than the terms of this injunction. No attempt was made by the Court to separate the acts which the unions could perform from those which would be unlawful. Everything was unlawful. The subject of the introduction of mechanical devices which displace labor must not even be mentioned. The constitutional guarantee of freedom of speech and assembly was clearly violated.

## CONCLUSION.

The Court of Appeals decision in this case has already excited widespread comment and inquiry. It will undoubtedly be frequently cited, in opinions throughout the country, for the proposition that the courts are the sole arbiters of the justification for labor disputes, the sole authority to which labor may look for permission to speak its mind on its grievances.

It is respectfully submitted that the rule which petitioners ask this Court to enunciate in the present case, is required as a natural and logical outgrowth of this Court's decision in the *Swing* case; otherwise, the various state courts may create chaos and stamp out freedom of speech by injunctions issued for no other reason than that an objective was sought which conflicted with an individual court's economic ideas.

The writ of certiorari requested by petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and said judgment reversed.

Respectfully submitted,

WILLIAM MACY,
Attorney for Petitioners.

# Supreme Court of the United States

OCTOBER TERM 1941

No. 295

---

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada,

*Petitioners,*

against

OSCAR OTTO TOUR, INC.,

*Respondent.*

---

## BRIEF FOR RESPONDENT

---

[redacted]
*Attorneys for Respondent.*

Of Counsel:
JULIUS WEISS
JOHN KANE.
SIMON J. SILVERMAN

## INDEX


| | PAGE |
|---|---|
| Summary Statement of Matter Involved | 1 |
| Proceedings Below | 3 |
| Reasons Relied On for Denial of Writ of Certiorari | 4 |
| POINT I—No Federal Question Is Involved | 4 |
| POINT II—No Federal Question Was Raised by Petitioners in the Courts Below | 7 |
| CONCLUSION | 9 |


## TABLE OF CASES CITED


| | PAGE |
|---|---|
| American Federation of Labor v. Swing, 312 U. S. 321 | 5 |
| American Railway Express v. Kentucky, 273 U. S. 269 | 7 |
| American Surety Co. v. Baldwin, 287 U. S. 156 | 8 |
| Bakery & Pastry Drivers' Union v. Wohl (June 2, 1941, No. 901, October Term, 1940) | 5 |
| Dorchy v. Kansas, 272 U. S. 306 | 6, 7, 8 |
| Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260 | 6 |
| Kryger v. Wilson, 242 U. S. 171 | 7 |
| Lynch v. New York, 293 U. S. 52 | 8 |
| Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 | 6 |
| O'Keefe v. Local 463 of Ass'n. of Plumbers, 277 N. Y. 300 | 6 |

# Supreme Court of the United States

OCTOBER TERM 1941

No. 295

---

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada,

*Petitioners,*

against

OPERA ON TOUR, INC.,

*Respondent.*

---

## BRIEF FOR RESPONDENT

---

### Summary Statement of Matter Involved

Petitioners seek review of an order and judgment of the Court of Appeals of the State of New York, affirming a final judgment of the Supreme Court, New York County, entered after a trial before the Special Term.

Respondent is a corporation organized under the laws of the State of New York in 1938, for the purpose of presenting grand opera. The character of the performances is identical to that of the conventional grand opera with the single exception that the orchestral accompaniment is produced from transcriptions or recordings of the operatic score (R. 14). This form of production obviated the necessity of employing instrumental musicians (R. 15). Thus reducing the cost of production, respondent hoped to make

grand opera commercially feasible in those sections of the United States where grand opera is rarely if ever presented (R. 178-180).

Petitioners are two labor unions who were sued through their respective presidents. Petitioner Weber represents the American Federation of Musicians (hereinafter referred to as "Musicians' Union"), a national union of instrumental musicians, and the petitioner Browne represents the International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada (hereinafter referred to as the "Stagehands' Union"), an international union consisting of persons employed as stagehands, technicians and electricians. All stagehands and technicians in the employment of respondent were members of the Stagehands' Union (Findings 18 and 23, R. 16, 17). Neither respondent's employees nor the union to which they belonged had any grievance against the respondent (R. 268, 327).

The Musicians' Union was the source of the difficulty. No member of this union was employed or eligible for employment by the respondent, nor did the union seek to unionize respondent's shop. Respondent's business did not require instrumental musicians. That was this union's only grievance. The union refused to consider any adjustment of this controversy short of destruction of the respondent's business (R. 188-189). To accomplish its purpose the Musicians' Union enlisted the aid of the Stagehands' Union to put the respondent out of business. As a result of the combination between these two unions the respondent was deprived of stagehand labor without which it could not carry on its business. The respondent's enterprise was finally compelled to shut down and was not given the opportunity to compete on any terms with music furnished by live musicians.

## Proceedings Below

The present action was then instituted by respondent for an injunction against the petitioners to restrain them from destroying its business by concerted action because of the use of recorded music. After a trial at Special Term, New York County, the petitioners were permanently enjoined from preventing the presentation by respondent of musical performances, from directing any person to leave respondent's employment or render services to respondent "on the ground that, or for the reason that, the plaintiff, Opera on Tour, Inc., uses recorded or transcribed or mechanically reproduced music in connection with its performances * * * or on any other ground which has its origin in or is due to steps or actions taken by the defendant unions in preventing the use by plaintiff of recorded or transcribed or mechanically reproduced music in connection with its performances" (R. 27, 28).*

This judgment was reversed by the Appellate Division, First Department, by a divided Court of 3 to 2, and the Court of Appeals by a divided Court of 4 to 2, in turn, reversed the Appellate Division, and reinstated and affirmed the judgment of the Special Term.

It should be noted at this point that the decree is not an absolute prohibition of the right to strike or picket as alleged by petitioners on page 3 of their petition, and upon which allegation they rest their claim to review by this Court.

---

* The other grounds mentioned in the judgment, to wit: respondent's use of foreign-made records or the employment of one Schavitch, were included to prevent an evasion of the decree on specious grounds belatedly asserted by petitioners to justify their conduct herein. Judge Callahan, writing for the majority in the Appellate Division, referring to the latter contention and also to the contention that respondent used a non-union pianist at rehearsal, said that they "do not seem to have been advanced by defendants until after the stagehands quit work and after this action was commenced" (R. 1245; 258 A. D. 516, 518).

In order that there might be no misunderstanding of its ruling, the Court of Appeals took pains to say:

> "At the outset we note that there is in the decision of the case at bar no denial of the right to strike. On that issue our decisions are not in doubt" (R. 1274. 285 N. Y. 348, 353).

Concerted activity to compel respondent to abandon the use of recorded music—an objective declared unlawful—was enjoined. This was determined as a matter of local common law as applied to the particular facts before the Court in the instant case.

## Reasons Relied On for Denial of Writ of Certiorari

The petition for certiorari here raises only questions of state law for, obviously, what does or does not constitute a lawful labor objective is not a Federal question. We respectfully submit that this Court should refuse to grant certiorari because:

1. No Federal question is involved.

2. No Federal question was raised by the petitioners in the courts below.

## POINT I

### No Federal question is involved.

The restrictions imposed upon petitioners by the decree herein is the use of their concerted powers to accomplish what the courts of New York have held in an illegal objective in the State of New York. Clearly the police powers of a state permit its courts to take such preventive action. True, to the extent stated in the decree the petitioners' freedom of action is restricted, but that is always the case with any decree in equity. The petitioners' position is based upon the untenable premise that they have the abso-

lute right to do anything they please—even to pursue an admittedly illegal objective—simply because they happen to be a labor union.

Petitioners place chief reliance in their petition and brief (Petition and Brief, pp. 7, 9, 10, 11, 15, 16) on this Court's reversal, on the authority of *American Federation of Labor* v. *Swing,* 312 U. S. 321, in the case of *Bakery & Pastry Drivers' Union* v. *Wohl* (June 2, 1941, No. 901, October Term, 1940). The identical issue—the right to picket where no employer-employee relationship existed—was involved in both the *Wohl* and *Swing* cases. That issue was stated by this Court in the *Swing* case as follows:

> "We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" (312 U. S. 321, 325).

The successful petitioners to this Court in the *Wohl* case presented (Petition, p. 8) the same question in the following language:

> "May a State Court absolutely enjoin admittedly peaceful and orderly picketing by a legitimate labor organization, merely because that picketing is not directed against an employer of members of the Union?"

Curtailment of concerted activity in each of the above situations was declared constitutionally invalid.

The issue in the instant case differs substantially from that raised in the *Wohl* and *Swing* cases. The legality of petitioners' objective was here drawn in question and the Court of Appeals held:

> "For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment is not a lawful labor objective" (R. 1278). 285 N. Y. 348, 357.

The declared objective of petitioners—to compel the discontinuance of the use of a mechanical device—was branded illegal. Having reached this conclusion, the Court implemented its views by a decree which prevents the commission of acts in furtherance of an unlawful purpose. This Court and the Court of Appeals have consistently recognized that concerted labor action is enjoinable either where unlawful means are adopted to achieve a lawful end, or where the end itself is unlawful. The Court of Appeals speaking through Lehman, J., in *O'Keefe* v. *Local 463 of Ass'n of Plumbers,* 277 N. Y. 300, 308, speaks of "action reasonably calculated to achieve a lawful end by lawful means". *Cf. Exchange Bakery & Restaurant, Inc.* v. *Rifkin,* 245 N. Y. 260, 262. So, too, this Court in *Dorchy* v. *Kansas,* 272 U. S. 306, speaking through Mr. Justice Brandeis said at page 311:

> "But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. * * * Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike. Compare *Aikens* v. *Wisconsin,* 195 U. S. 194, 204-205."

We contend that this case is governed by the ruling of this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, which sustains the ancient right of a sovereign state to police its inhabitants through all branches of government. This decree must be judged by its application to the situation confronting the state court, and that court's interpretation of its local law not inconsistent with the Federal Constitution. In the *Milk Wagon Drivers Union* case, *supra,* this Court said at pages 292-293:

> "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law."

Were this otherwise, every abridgement of freedom of action by injunction of a state court, on petitioners' theory, would raise a question under the Fourteenth Amendment. *Cf. Dorchy* v. *Kansas,* quoted *supra.*

A local question having been determined by the State Court, this Court is without jurisdiction to review. As this Court said in *American Railway Express* v. *Kentucky,* 273 U. S. 269, 272-273:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and makes all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 165, 166."

See also:

*Kryger* v. *Wilson,* 242 U. S. 171.

## POINT II

**No Federal question was raised by petitioners in the Courts below.**

The attempt to raise questions of the alleged infringement of petitioners' rights under the Federal Constitution was made for the first time upon petitioners' application to the Court of Appeals for amendment of the remittitur of that Court "so as to show that questions under the Federal Constitution were presented and necessarily passed upon" (R. 1302). That application was denied (R. 1296).

The answer (R. 10-12) and petitioners' requests to find (R. 30-47), contain no suggestion of any constitutional question; nor was any such point raised upon the trial at the Special Term. The assertion by petitioners (Petition, p. 5) that the constitutional guarantee of free speech "was thus specifically drawn in question" is not supported by the

record. The quotation on that page is bodily torn from its context and an unwarranted meaning ascribed to it. The quotation is taken from a statement of respondent's counsel in the course of a colloquy during the trial. Challenging the petitioners' contention that there was an *absolute* right to strike, respondent's counsel, referring to the authority of *Dorchy* v. *Kansas, supra,* said:

> "Neither the common law nor the 14th amendment confers the absolute right to strike. That is what Judge Brandeis states in a decision in the United States Supreme Court * * *" (R. 122).

This is a far cry from a claim by petitioners that their constitutional rights were put in issue. This passing reference to the Fourteenth Amendment by counsel for *respondent* in answer to petitioners' extraordinary claim of immunity, has thus been twisted into a specific drawing into a question of the issue of the constitutional guarantee of free speech. Petitioners' defense at all times and in all Courts was limited to the argument that respondent did not state a cause of action under the New York common law and that Section 876-a of the Civil Practice Act, governing the issuance of injunctions in "labor disputes", applied (R. 67, 546). The record will be searched in vain in an effort to find any constitutional question raised by petitioners. Such questions were presented by petitioners, as indicated above, on the application in the Court of Appeals (R. 1301-1302) *for the first time.* They were not seasonably raised and cannot avail in this proceeding. *American Surety Co.* v. *Baldwin,* 287 U. S. 156.

The numerous references in the petition (pp. 5, 6) to various Federal authorities cited by petitioners in their briefs in the Courts below are without effect on the question now presented to this Court. Mr. Chief Justice Hughes, in *Lynch* v. *New York,* 293 U. S. 52, 54, has said:

"Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214."

These requirements have not been met herein.

## CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be denied.

JACK LEWIS KRAUS, II,
*Attorney for Respondent.*

*Of Counsel:*
JULIUS WEISS
JOHN KADEL
SELIG J. SILVERMAN

(14)

SEP 23 1941
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *PETITIONERS' REPLY BRIEF*

WILLIAM MACY,
Attorney for Petitioners.

Hallsby Press Inc.—NYC

# INDEX

PAGE

A Federal, and Not a Local Question, Is Involved Here 1

The Federal Question Was Sufficiently Raised, Was Necessarily Determined and Was Actually Decided by the New York Court of Appeals ..... 4

Conclusion ..... 6

## AUTHORITIES CITED

American Federation of Labor v. Swing, 312 U. S. 321 2

American Guild of Musical Artists v. Petrilla, 286 N. Y. 226, Official Advance Sheet, September 6, 1941 .. 2, 3, 5

Duplex Co. v. Deering, 254 U. S. 488 ..... 3

Fourteenth Amendment of the U. S. Constitution .... 1

Lynch v. New York 293 U. S. 52 ..... 5, 6

Thornhill v. Alabama, 310 U. S. 88 ..... 2, 3

Wohl v. Bakery & Pastry Drivers' Union, 284 N. Y. 788 ..... 2, 4, 5

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *PETITIONERS' REPLY BRIEF*

### (1)

### *A Federal, and Not a Local Question, Is Involved Here.*

Respondent argues that whether a labor objective is legal, is a matter of local concern; meaning that when a State Court enjoins either picketing or communication of any sort because of an illegal labor objective, the State Court is dealing with a local question and no Federal question can be involved. If this be so, then the forty-eight states can make forty-eight varied rulings on the legality of labor objectives, enjoin free speech as a result, and none of the cases could reach this Court notwithstanding the violation of the XIVth Amendment to the Constitution. The chaos which would

result from such a situation is pointed out in petitioner's brief (pp. 15, 16).

Respondent forgets that questions between labor and capital affect not only the participants in the dispute, but are matters of public concern. This Court so stated in the *Thornhill* case, 310 U. S. 88.

Neither was the labor dispute in this case a local question geographically speaking. Respondent was organized as a corporation in New York, but its activities were conducted outside of New York State, in various parts of the country (R. 570, 595, 603, 604).

If the question presented by this petition is not a Federal question, then the question in the *Wohl* case was not a Federal question, and the same would hold true of the *Thornhill* case and of the *Swing* case. Those cases, as well as the case at bar, involved freedom of speech and of assembly; and a Federal question arises where these rights, guaranteed by the Constitution, are infringed upon by a State court which says that speech may not be indulged in and the assemblies may not be had because the State Court holds that they are outside a judicially determined economic area prescribed by the individual Court. Once we concede that each of the forty-eight State Courts may prescribe for itself an area outside of which all attempts at persuasion by speech, picketing or assembly are illegal, we immediately annul the Federal guarantee of free speech.

Petitioners' brief (pp. 11, 16) points out the national importance of the question involved here, and the determined effort of the New York Court of Appeals to legislate judicially on the subject of labor objectives.

This is emphasized by the decision of that Court on July 29, 1941, after the presentation of the petition herein, in *American Guild of Musical Artists* v. *Petrillo* (286 N. Y. 226, Official Advance Sheet, September 6, 1941), where the

New York Court of Appeals reaffirmed its position taken in the instant case, saying at page 231:

> "Unless the objective of the defendant union is a lawful one, this controversy is not a 'labor dispute' in the sense of section 876-a of the Civil Practice Act. (*Opera on Tour, Inc.* v. *Weber, supra.*)"

Chief Judge Lehman again dissented (286 N. Y. saying at p. 232):

> "For the reasons stated in my dissenting opinion in the earlier case (Opera on Tour v. Weber), I felt constrained to find that the injunction 'constitutes an intrusion by the court into a field from which it is excluded under the law of the state as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution.' For the same reasons I cannot accept the decision there as a precedent for subsequent decisions. I must continue to refuse my sanction to an injunction which I regard as an intrusion by the court into a field from which, in my opinion, it is excluded by statute, by the Constitution of the State of New York and by the Constitution of the United States."

This last decision by the New York Court of Appeals makes it all the more necessary that this Court pass on the subject.

The *Thornhill* case, 310 U. S. at page 104, refers with approval to a dissenting opinion by Mr. Justice Brandeis in *Duplex Co.* v. *Deering*, 254 U. S., at page 488:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle

without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the Legislature which, while limiting the individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

## (2)

### *The Federal Question Was Sufficiently Raised, Was Necessarily Determined and Was Actually Decided by the New York Court of Appeals.*

Respondent, with petitioners' consent, has added to the Record petitioners' application to the New York Court of Appeals for a reargument, and if that be denied, then to amend the remittitur so as to affirmatively state that the Court of Appeals passed upon the Federal question here involved. The denial of that application is accompanied by no reasons therefor (R. 1296), and in no way changes the fact that a Federal question was raised by petitioners and necessarily passed upon by the Court of Appeals. That court probably felt that the opinions there filed disclosed the Federal question presented and passed upon. The Court did not say that the Federal question was not involved or was not raised. The denial of the application leaves petitioners in the same position as though the application had not been made. As our main brief shows (pp. 5, 20) the question was raised both by petitioners' counsel and respondent's counsel, at the trial and in the briefs on appeal.

The decision of the New York Court of Appeals in the *Wohl* case (284 N. Y. 788), was rendered December 31,

1940, without opinion. The instant case had been argued before that and then was awaiting decision. Because no opinion was filed in the *Wohl* case, the Court of Appeals (after this Court had denied certiorari), amended its remittitur to show that the Federal question raised by petitioners here was there presented and passed upon. There, as here, that Court upheld the propriety of an injunction, solely on the ground of an illegal labor objective. The amendment of that remittitur was after that Court's decision in the instant case, and was followed on July 29, 1941, by its decision in the *American Guild of Musical Artists'* case, again reiterating the same rule on the authority of the instant case, after this Court on June 2, 1941, granted certiorari on rehearing and reversed the judgment of the New York Court of Appeals in the *Wohl* case. There can be no question therefore that this Federal question was presented to and passed upon in this case by the Court of Appeals.

Respondent's suggestion that petitioners' answer to the complaint does not specifically raise the constitutional question, has several answers: (1) The New York practice does not require this. (2) Petitioners could not possibly anticipate the issuance of such an extraordinary injunction. (3) The question was properly and timely presented.

*Lynch* v. *New York,* 293 U. S. 52, is cited by respondent on the question of this Court's jurisdiction. There, however, the State Court rendered no opinion, so that this Court did not have before it the ground upon which the decision of the State Court rested. There the Record itself showed two grounds. One involved a Federal question and the other did not. The ground independent of the Federal question was sufficient in itself to sustain the State Court. This Court therefore refused to take jurisdiction. Here, however, we have only one question, and that was passed upon by the Trial Court and the State Appellate Courts. Applying

the rule quoted by respondent from the *Lynch* case, it affirmatively appears from the Record—in fact from the opinions of the Court of Appeals that a Federal question was presented to it for decision; that the Federal question was actually decided by that Court; that the judgment as rendered could not have been given without deciding it.

The writ of certiorari should be granted and the judgment of the New York Court of Appeals reversed.

Respectfully submitted,

WILLIAM MACY,
Attorney for Petitioners.

Office - Supreme Court, U. S.
FILED
DEC 20 1941
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF*

WILLIAM MACY,
*Attorney for Petitioners.*

Hallsby Press Inc.—NYC

# INDEX


PAGE

Petition for Rehearing of Petition for Writ of Certiorari to Court of Appeals ..... 1

Statement of Facts ..... 1

Grounds for Rehearing ..... 2

Statement by Counsel ..... 4

Brief in Support of Petition for Rehearing ..... 5

Point I

The New York Court of Appeals necessarily decided the federal question presented by the petition for certiorari; and the judgment of the Court of Appeals could not have been given without deciding that question ..... 5

Conclusion ..... 12

## AUTHORITIES CITED


| | PAGE |
|---|---|
| American Federation of Labor v. Swing, 312 U. S. 321, 324 | 6 |
| American Guild of Musical Artists v. Petrillo, 286 N. Y. 226, 232 | 7 |
| Brown v. Atwell, 92 U. S. 327 | 9 |
| Dorchy v. Kansas, 272 U. S. 306, 311 | 8 |
| Enterprise Irr. Dist. v. Farmers' Mut. Canal Co., 243 U. S. 157, 164 | 11, 12 |
| Fourteenth Amendment of Constitution of United States | 7, 8, 9 |
| Honeyman v. Hanan, 300 U. S. 14, 21 | 9, 11 |
| Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52 | 10 |
| Section 876 (a) of the New York Civil Practice Act | 10 |
| Wohl v. Bakery & Pastry Drivers Union, 284 N. Y. 788 amended remittitur 285 N. Y. 483 | 7, 9, 10 |

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

### *Statement of Facts.*

1. This Court on October 13th, 1941, in denying a writ of certiorari to the New York Court of Appeals said:

> "It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals. The petition for writ of certiorari is denied. Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52; Honeyman v. Hanan, 300 U. S. 14, 18."

2. Petitioners thereupon applied to the New York Court of Appeals for a certificate that that Court necessarily decided said federal question, to wit, whether the injunction

issued in this case violated the freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment to the United States Constitution, or, in the alternative, for a reargument of petitioners' previous application to that Court for a reargument of the appeal, and in the event of the denial of such rehearing, for an amendment of its remittitur.

The New York Court of Appeals denied that application without opinion on November 27th, 1941.

3. This Court on November 1, 1941, extended petitioners' time to make the present application for a rehearing until twenty-five days after the determination by the New York Court of Appeals of petitioners' said application for such certificate.

4. Respondent's only production was the opera "Faust" (R. 16, 74), and its only grievance is that it was obliged to discontinue such production because the stagehands withdrew their services and refused to continue any further services for the reason that respondent used mechanized music in place of living musicians.

There was no attempt to dispute petitioners' good faith, absence of malice, fraud, force, coercion or intimidation of any kind, nor of petitioners' honest belief that their acts were necessary for the protection of the employment opportunities of their members in furtherance of their economic interest in the continued employment of those in allied trades, and to prevent increases in their already largely unemployed ranks (R. 89, 140, 423, 424, 432, 462, 721).

### *Grounds for Rehearing.*

A. The New York Court of Appeals did necessarily decide the federal question presented by the petition to this Court for a writ of certiorari.

B. The judgment of the New York Court of Appeals could not have been given without deciding such federal question.

The petition for rehearing should be granted, and on such rehearing the writ of certiorari granted.

Dated: New York, December 17th, 1941.

JOSEPH N. WEBER,
Individually and as President of American Federation of Musicians.
GEORGE E. BROWNE, individually and as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada.

By WILLIAM MACY,
Attorney for Petitioners,
521 Fifth Avenue,
New York City, N. Y.

***Statement by Counsel.***

WILLIAM MACY, counsel for the petitioners herein, certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated, New York City, December 17th, 1941.

WILLIAM MACY,
Counsel for Petitioners.

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

*—against—*

OPERA ON TOUR, INC.,

Respondent.

## *BRIEF IN SUPPORT OF PETITION FOR REHEARING*

### POINT I.

**The New York Court of Appeals necessarily decided the federal question presented by the petition for certiorari; and the judgment of the Court of Appeals could not have been given without deciding that question.**

The prevailing opinion in the Court of Appeals states (R. 1274):

> "The only issue is whether the leaders of the defendant unions were engaged in promoting 'a lawful labor objective' when the Musicians' Union induced the Stagehands' Union to join in a combination, to destroy an enterprise solely because of the use of machinery in the production of music in place of the employment of live musicians."

Also (R. 1279):

> "In other words, there is involved in the case at bar solely the demand that a new enterprise shall not make use of machinery in order to create places for live musicians."

However, the injunction as issued is permanent and enjoins, in unlimited terms, not only strikes and picketing, but also peaceful persuasion, even by individual musicians, of any other musician or anyone else, not to work for respondent. It thus prohibits freedom of speech and assembly and denies to petitioners equal protection of the laws in violation of the Fourteenth Amendment.

Respondent's brief to this Court in opposition to the petition for certiorari complains (p. 2) that respondent "was not given the opportunity to compete on any terms with music furnished by live musicians". The injunction allowed by the New York Court of Appeals, however, not alone gives the musicians no opportunity to compete with mechanized music, but *prohibits these musicians from competing* with mechanized music. In effect, the New York Court of Appeals displaces live music in favor of mechanized music and says that any attempt by live musicians to compete with mechanized music is an unlawful labor objective.

This Court in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 324, said:

> "But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that 'peaceful persuasion' was forbidden in this case because those who were enjoined were not in Swing's employ."

The Court of Appeals thus grants this sweeping injunction because of what it says is not "a lawful labor objective,"

citing its own recent decision in *Wohl* v. *Bakery & Pastry Drivers Union*, 284 N. Y. 788, as affirming without opinion, a similar injunction prohibiting picketing because of an "unlawful labor objective." In that case the Court of Appeals later amended its remittitur so as to state that the Court necessarily passed upon the same federal question here presented, *i.e.*, violation of the Fourteenth Amendment, saying (285 N. Y. 483):

> "This Court held the injunction aforesaid did not violate the rights of freedom of speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States."

When the Court of Appeals decided the *Wohl* case, it had before it the case at bar for decision; and in the case at bar Chief Judge Lehman dissented for the specific reason that the injunction

> "constitutes an intrusion by the Court into a field from which it is excluded * * * by the Constitution."

And in the later case of *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226, 232, Chief Judge Lehman again dissented, referring to his previous dissent in the case at bar as follows:

> "For the reasons stated in my dissenting opinion in the earlier case (Opera on Tour v. Weber), I felt constrained to find that the injunction 'constitutes an intrusion by the court into a field from which it is excluded under the law of the state as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution.' For the same reasons I cannot accept the decision there as a prece-

dent for subsequent decisions. *I must continue to refuse my sanction to an injunction which I regard as an intrusion by the court into a field from which, in my opinion, it is excluded by statute, by the Constitution of the State of New York and by the Constitution of the United States.*" (Italics ours.)

Thus it appears that the Court of Appeals' judgment is based solely on the ground that petitioners' labor objective is illegal and, on that ground alone justifies, enjoining freedom of speech and assembly guaranteed by the Fourteenth Amendment. That injunction could not, therefore, have been given without deciding that it is not in violation of the Fourteenth Amendment, and as to that Chief Judge Lehman specifically dissented.

The Court of Appeals therefore necessarily passed upon this federal question, and that directly appears from the prevailing opinion as well as the dissenting opinion in the Court of Appeals.

The respondent's quotation in its brief to this Court, page 6, from *Dorchy* v. *Kansas*, 272 U. S. 306, 311, is substantially the same quotation stated to the Trial Court (R. 122) on the proposition that the Fourteenth Amendment to the Constitution is no protection for a strike having an illegal purpose. Respondent's brief in the Appellate Division contained the same quotation from the *Dorchy* case, and respondent cited that case in its brief in the New York Court of Appeals.

In other words, respondent insisted that the injunction sought and obtained by respondent in this case does not violate the Fourteenth Amendment, and thus affirmatively contended that the Fourteenth Amendment does not apply.

However, despite the fact that the prevailing opinion in the instant case admits that "the question presented for decision is far reaching and of vital importance to the best

interests of unions, of employees, of employers and of the general public" (285 N. Y. 348, 352), the Court of Appeals declined to grant a certificate or amend the remittitur so that this nationally important question could be passed upon by this Court.

This Court in *Honeyman* v. *Hanan*, 300 U. S. 14, 21, quotes from *Brown* v. *Atwell*, 92 U. S. 327, that this Court will grant certiorari if the record shows that the federal question

> "was necessary to the determination of the case, and that it was actually decided, *or that the judgment as rendered could not have been given without deciding it*". (Italics ours.)

This Court in that case also stated that it must determine for itself whether a federal question was necessarily passed upon by the State Court; that whether a federal question was presented and decided in the State Court, was itself a federal question which necessarily rests upon an examination of the record; that the presence or absence of a certificate from the State Court, while it may aid this Court in examining the record, is not of itself controlling:

> "It cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present."

It must be apparent that where the State Court takes it upon itself to declare a labor objective unlawful, even though that objective be pursued by peaceful means, and issues a sweeping injunction preventing the discussion of such objective, a federal question is presented because the Fourteenth Amendment becomes directly involved. If the

question of the violation of the Fourteenth Amendment is not presented by this state of facts, then it was not presented in the *Wohl* case, nor could it be presented in any case. If by the simple expedient of declaring a labor objective unlawful a Court may deprive a litigant of the protection of the Fourteenth Amendment, then the Fourteenth Amendment is dead.

If any other question had been presented to the New York Court in the instant case upon which the injunction could independently have been sustained, then under the *Lynch* case the petitioners have no standing in this court.

It is respectfully submitted that upon a reconsideration of the record and a careful reading of the opinion in the Court of Appeals, this Court will come to the conclusion that the New York Court of Appeals could not have reached its decision without deciding the federal question.

As was pointed out in the original petition for certiorari, the only other question presented by the pleadings in this case was whether Section 876 (a) of the New York Civil Practice Act was applicable. The Special Term of the New York Supreme Court, the Appellate Division, and the Court of Appeals all ruled that question out of the case.

What other question then remained for the Court of Appeals to decide in arriving at the conclusion that the petitioner-unions should be prevented from speaking on the subject of the objective which they sought to obtain by admittedly peaceful means? No other question but the right of the Court to enjoin free speech where the Court did not agree with petitioner's economic views.

The New York Court decided that the legality of a labor objective must be determined by its own opinion of the economic soundness of the objective. If that Court felt that the objective was economically sound, the unions might freely speak. If unsound according to that Court's opinion, the unions may not speak.

The injunction herein restraining the unions from discussing their objective was necessarily (though not admitted by the Court) based upon the ground that such an injunction did not violate freedom of speech because the unions were not entitled to freedom of speech where they pursued an objective objectionable to that Court's economic ideas. That is the only conclusion which can be reached from a reading of this record, and that conclusion would have to be reached even if no opinion had been written by the Court of Appeals.

It is true, as this Court pointed out in the *Honeyman* case that if this federal question were not presented by the record a certificate from the Court of Appeals that it had necessarily decided the federal question would not avail the petitioners now, because the State Court cannot import into the record a question which the record itself does not disclose. It is equally true that the refusal of the Court of Appeals to grant a certificate or an amendment of the remittitur does not serve to remove from the record a federal question where it is apparent from the record that that question was the only question involved and that the Court of Appeals could not have reached its decision without necessarily deciding the federal question.

Petitioners feel, from the form of this Court's decision denying their petition for certiorari, that this Court intended to give petitioners an opportunity to make the application to the Court of Appeals referred to in this petition for rehearing.

This, the Court of Appeals has declined to do. It is submitted, with all deference to the Court of Appeals, that its refusal to certify the federal question was arbitrary, and in any event, the certificate is unnecessary.

This Court has indicated that such a refusal to certify will not prevent it from taking jurisdiction.

Thus, in *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164, this Court said:

> "* * * where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. * * * And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, ibid. 359, 367."

In the instant case we find the Court of Appeals saying (R. 1274): "* * * there is in the decision of the case at bar no denial of the right to strike", and then saying that the unions may not strike, *in this particular instance*, because the Court disapproved—not the method employed—but the objective sought. Although it said it did not do so, it actually did pass on the right to strike, and actually decided that the injunction issued did not infringe free speech because the unions were not entitled to freedom of speech in view of the absence of a legal labor objective. The Chief Judge of the New York Court of Appeals, in his able dissenting opinion, told the majority that by their decision they were invading the unions' rights. The refusal of the majority of that Court to meet the issue squarely, and its evasion of the real and only question presented by the record, calls for the invocation of the rule in *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164 (*supra*). The national importance of the question justifies this.

## CONCLUSION.

**The petition for rehearing and writ of certiorari should be granted and the judgment reversed.**

Respectfully submitted,

WILLIAM MACY,
Counsel for Petitioners.

FILED
DEC 31 1941
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**OCTOBER TERM 1941**

**No. 295**

---

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada,

*Petitioners,*

against

OPERA ON TOUR, INC.,

*Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

---

JACK LEWIS KRAUS, 2ND,
*Attorney for Respondent.*

*Of Counsel:*
JULIUS WEISS,
JOHN KADEL,
SELIG J. SILVERMAN.

# Supreme Court of the United States

OCTOBER TERM 1941

**No. 295**

---

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada,

*Petitioners,*

against

OPERA ON TOUR, INC.,

*Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

---

### Respondent's Statement

Since April, 1941, the petitioners have been shuttling between this Court and the Court of Appeals of the State of New York. To date they have been before the latter Court on three separate occasions, and this is their second appearance before this Court. They now seek a rehearing of an earlier petition for certiorari denied by this Court on October 13, 1941.

Before filing the original petition for a writ of certiorari petitioners applied to the New York Court of Appeals for alternate relief either to reargue the case on the merits

or "that the remittitur be amended so as to show that questions under the Federal Constitution were presented and necessarily passed upon by this Court, and to state such questions, to wit: That the injunction in this case violates the Fourteenth Amendment to the Constitution of the United States". This motion was denied in its entirety by the Court of Appeals.

Then followed the application for a writ to this Court. In opposing the petition respondent asserted that (1) no Federal question was involved, and (2) no Federal question had been raised by the petitioners in the Court below. We need not repeat what is already contained in our brief to this Court upon the earlier application. The petition was denied by this Court.

Petitioners then moved a second time in the Court of Appeals for amendment of the remittitur, requesting that the Court state "that in deciding the appeal herein this Court necessarily decided that the injunction issued in this action did not violate the freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment to the United States Constitution". The contentions in support thereof are the same as are now being advanced to this Court. For a second time the Court of Appeals denied the motion to amend the remittitur.

Despite the fact that the Court of Appeals of the State of New York has twice specifically ruled that it did not decide the case on Federal grounds, petitioners base their latest application to this Court on the ground that it did. Petitioners' labored argument cannot alter the fact that the Court of Appeals did not decide the question on Federal grounds. Respondent adheres to what was said in its earlier brief in opposition to the original petition for certiorari: that the case presents only a question of local New York law, and that petitioners never before raised the Constitutional points now presented to this Court. There has been no change in the situation since petitioners were last before this Court, and petitioners do not contend that this Court has overlooked anything.

Since this Court has once before held that a Federal question was not raised, and the Court of Appeals has twice affirmed this fact, it is respectfully submitted that the petition for rehearing of the application for a writ of certiorari be denied.

Dated: New York, N. Y., December 29, 1941.

Respectfully submitted,

JACK LEWIS KRAUS, 2ND,
*Attorney for Respondent.*

*Of Counsel:*
JULIUS WEISS,
JOHN KADEL,
SELIG J. SILVERMAN.